

# WSDOT's Overall Disadvantaged Business Enterprise Goal and Disparity Study

## Q: WHAT IS THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM?

**A:** The purpose of the Disadvantaged Business Enterprise (DBE) program is to ensure a level playing field and foster equal opportunity for firms owned and operated by disadvantaged individuals on United States Department of Transportation (USDOT) financially-assisted contracts and procurements. Washington State Department of Transportation (WSDOT) is required to implement the DBE program on projects that include funds from Federal Highway Administration (FHWA), Federal Transit Administration and Federal Aviation Administration.

## Q: WHY DID WSDOT CONDUCT A DISPARITY STUDY?

**A:** To be in compliance with federal regulations, WSDOT must conduct a disparity study which analyzes whether a disparity (differences) exist between the number of specified individuals or groups that are available to participate in contracting opportunities, and those that actually do participate. WSDOT's disparity study began in 2012 and is not connected to or a result of the recent FHWA findings related to the Alaskan Way Viaduct project's use of DBEs.

## Q: WHY DID WSDOT'S OVERALL DBE PARTICIPATION GOAL CHANGE?

**A:** There are a number of factors that contribute to the change in WSDOT's overall annual goal. Most notably, WSDOT's previous overall DBE goal was based on information from a 2005 study. That information is now out of date. WSDOT's overall DBE goal for Federal Fiscal Years (FFYs) 2015-2017 is based on information from a disparity study that WSDOT commissioned in 2012. Information from the study reflects the current availability of DBEs for WSDOT contracts. The methodology to calculate current availability took into account many factors including the types and sizes of WSDOT contracts; the capacity of minority- and women-owned businesses; and the qualifications and interest of minority- and women-owned businesses for WSDOT contracts.

## Q: HOW WILL CAUCASIAN WOMEN-OWNED BUSINESSES BE IMPACTED BY THE DISPARITY STUDY?

**A:** In the case that USDOT approves a waiver for women-owned DBEs, WSDOT will continue to encourage prime contractors to use qualified women-owned DBEs as subcontractors. The intent of the federal DBE program is for prime contractors to build relationships with DBEs and to use them, even when there are not any DBE contract goals to meet.

Contracting Equity Program Within WSDOT	Participation by Race, Ethnicity and Gender of DBE Owner		
	Caucasian Female Owned DBEs	Minority* Female Owned DBEs	Minority* Male Owned DBEs
<b>DBE Race-Conscious Efforts (Condition of Award Goals)</b>	No	Yes	Yes
<b>DBE Race-Neutral Efforts</b>	Yes	Yes	Yes
<b>DBE Support Services (free plans, manuals, networking events, training, etc.)</b>	Yes	Yes	Yes
<b>Minority and Women's Business Enterprise Program</b>	Yes	Yes	Yes
<b>Small Business Enterprise Program</b>	Yes	Yes	Yes

\* Minorities are defined by the federal rules as African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent Asian-Americans.

In addition, in the case that USDOT approves a waiver for women-owned DBEs, they will still be eligible for all of the race- and gender-neutral program measures that WSDOT uses as part of our implementation of the federal DBE program. Those programs include one-on-one mentoring, technical assistance, and our small business program. Moreover, minority women-owned DBEs will still be eligible for all of the measures that WSDOT uses as part of its implementation of the federal DBE program, including DBE contract goals.

Finally, WSDOT will regularly monitor the effect that the waiver has on women-owned DBEs. If the waiver has substantial, detrimental effects on the overall use of Caucasian women-owned DBEs, then WSDOT will take swift corrective action.

## Q: WHY IS WSDOT'S OVERALL DBE GOAL LOWER THAN SOUND TRANSIT'S OVERALL DBE GOAL?

**A:** Both WSDOT and Sound Transit based their overall DBE goal calculations on analyses of the availability of minority- and women-owned businesses for their contracts. Those analyses were tailored to each agency's contracts and relevant geographic market areas. WSDOT and Sound Transit award different types of contracts of different sizes. In addition, their relevant geographic market areas also differ. WSDOT operates across the entire state,

whereas Sound Transit only operates in the Seattle metropolitan area. Therefore, the availability of minority- and women-owned businesses for WSDOT contracts — and thus, WSDOT's overall DBE goal — differs from that of Sound Transit.

### **Q: WHY IS WSDOT MAKING WOMEN-OWNED DBEs INELIGIBLE FOR DBE CONTRACT GOALS? IN OTHER WORDS, AREN'T ALL WOMEN-OWNED DBEs BEING PUNISHED FOR THE SUCCESS OF A FEW?**

**A:** No, WSDOT's implementation of the federal DBE program has been very successful with regard to the participation of Caucasian women-owned DBEs. Considered together, Caucasian women-owned DBEs received more contract dollars from WSDOT than what would be expected given their availability for that work. Because of that outcome, WSDOT must request a waiver that, if approved by USDOT, will deem women-owned DBEs as ineligible for our DBE contract goals program. Doing so ensures that WSDOT's implementation of the federal DBE program is constitutional and consistent with federal regulations and relevant court decisions.

### **Q: IF CAUCASIAN WOMEN-OWNED DBEs HAVE BEEN PARTICULARLY SUCCESSFUL IN OBTAINING WSDOT CONTRACTS, WHY IS WSDOT DEEMING ALL WOMEN-OWNED DBEs AS INELIGIBLE FOR DBE CONTRACT GOALS?**

**A:** The federal DBE Program does not treat Caucasian, white women-owned DBEs as a group separate from other women-owned DBEs. Thus, because of how the program is structured, WSDOT cannot request a waiver for only Caucasian, white women-owned DBEs. We must request a waiver for all women-owned DBEs. **However**, in the case that USDOT approves a waiver for women-owned DBEs, the waiver will, for all intents and purposes, only apply to Caucasian women-owned DBEs. Minority women-owned DBEs will still be eligible to participate in WSDOT's implementation of the federal DBE program, including DBE contract goals, so long as they are DBE-certified along with their corresponding minority groups.

### **Q: DO FEDERAL REGULATIONS AND COURT DECISIONS SUPPORT WSDOT'S DETERMINATION THAT WOMEN-OWNED DBEs ARE INELIGIBLE FOR DBE CONTRACT GOALS AT THIS TIME?**

**A:** Yes. Federal regulations and recent relevant federal court decisions (e.g., *AGC, San Diego v. California Department of Transportation; Western States Paving Company v. Washington State DOT; H.B. Rowe v. Tippet*) support WSDOT's determination that women-owned DBEs are ineligible to satisfy federal DBE contract goals at this time, a determination that WSDOT made based on all available evidence and information. For example, USDOT's Official Questions and Answers (Q&A's) regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26) states that the Ninth Circuit Court of Appeals determined in the *Western States Paving* case that: "Whether race-based measures are

needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry. In addition, even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects."

The results of WSDOT's disparity study demonstrate that the statistical evidence does not support a conclusion that Caucasian women-owned DBEs "have actually suffered discrimination." While the study did acknowledge some "anecdotal evidence" of discrimination involving women-owned DBEs, the courts have also made it clear that anecdotal evidence alone is not sufficient to indicate the presence of discrimination or its effects and that statistical evidence is necessary to support an inference of discrimination. (e.g., *AGC, San Diego v. California Department of Transportation; Western States Paving Company v. Washington State DOT; H.B. Rowe v. Tippet*).

### **Q: WILL WSDOT'S DECISION RESULT IN CAUCASIAN WOMEN-OWNED FIRMS GOING OUT OF BUSINESS?**

**A:** Federal regulations and court decisions related to the federal DBE program do not provide a way for agencies to examine and account for potential outcomes for individual businesses. We understand and appreciate that changes to WSDOT's implementation of the program may have adverse effects for some businesses. That is why we are going to be very diligent about monitoring the effects that the potential waiver has on Caucasian women-owned DBEs. If the waiver is approved by USDOT and if it has substantial, detrimental effects on the overall use of Caucasian women-owned DBEs, WSDOT will take swift corrective action.

### **Q: SHOULD WOMEN-OWNED DBEs JUST GET RID OF THEIR CERTIFICATIONS?**

**A:** No, there are other benefits from being DBE certified. In the case that USDOT approves a waiver for women-owned DBEs, women-owned businesses will still benefit from being DBE certified. DBE contract goals are just one of many components of the federal DBE program. For example, being DBE certified automatically makes a firm Small Business Enterprise certified, which qualifies them for many of WSDOT's, and the state's, race- and gender-neutral program measures, as well as those of other local agencies. Moreover, minority women-owned DBEs will still be eligible for all of the measures that WSDOT uses as part of its implementation of the federal DBE program, including DBE contract goals.

In addition, in the case that USDOT approves a waiver for women-owned DBEs, WSDOT is going to be very diligent about monitoring the effects that the potential waiver has on Caucasian women-owned DBEs. If the waiver is approved by USDOT and if it has substantial, detrimental effects on the overall use of Caucasian women-owned DBEs, WSDOT will take swift corrective action. Maintaining a DBE certification will help WSDOT monitor the impacts of the potential waiver and, if WSDOT determines that revoking the waiver is appropriate, women-owned DBEs would again become eligible for our DBE contract goals program.

## **Q: IS WSDOT CLAIMING THAT GENDER-BASED DISCRIMINATION NO LONGER EXISTS IN THE MARKETPLACE?**

**A:** WSDOT acknowledges that gender-based discrimination may exist in the local marketplace. However, to implement the federal DBE program in a constitutional manner that is consistent with federal regulations and relevant court decisions, WSDOT must limit the use of DBE contract goals to those DBE groups that exhibit an “inference of discrimination.” Quantitative disparities between DBE participation and DBE availability has been accepted by the courts as an indication of an “inference of discrimination.” Qualitative and anecdotal evidence, although important, has not been accepted by the courts as sufficient on its own to justify the use of DBE contract goals.

## **Q: THERE’S CONCERN THAT WITH THE WAIVER, PRIME CONTRACTORS WON’T BE ABLE TO MEET DBE CONTRACT GOALS, DUE TO A LACK OF DBE AVAILABILITY. HOW WILL WSDOT ADDRESS THAT?**

**A:** The goal setting process for individual contracts will account for the availability of underutilized DBEs, in this case minority-owned DBEs, for relevant work areas associated with the project. That is, when WSDOT reviews project for DBE goals it will take into consideration the potential waiver and availability of underutilized DBEs.

In addition, WSDOT’s DBE contract goals allow for flexibility. If prime contractors are unable to meet the goal through subcontractor commitments with DBEs, then they can complete good faith efforts waivers indicating that they made appropriate efforts to subcontract with DBEs but were unable to do so.

## **Q: PRIME CONTRACTORS HAVE SPENT A LOT OF TIME AND EFFORT BUILDING RELATIONSHIPS WITH WOMEN-OWNED DBE SUBCONTRACTORS. DOES THIS MEAN THEY CAN’T USE THOSE SUBCONTRACTORS NOW?**

**A:** WSDOT encourages prime contractors to continue using qualified women-owned DBEs as subcontractors. The intent of the federal DBE program is for prime contractors to build relationships with DBEs and to use them, even on contracts that do not include DBE contract goals. However, in order to meet DBE contract goals, prime contractors will also have to build relationships with underutilized DBEs and use them as subcontractors, or show good faith efforts to do so.

## **Q: HOW DID BBC CONDUCT THE AVAILABILITY ANALYSIS?**

**A:** BBC used a “custom census” approach to calculating the relative availability of minority- and women-owned businesses for the WSDOT disparity study. BBC’s availability analysis methodology has been specifically approved by the Ninth Circuit Court of Appeals and by other courts (AGC, *San Diego v. California Department of Transportation*). BBC began the

analysis by identifying business establishments located in the state of Washington whose primary lines of work are most relevant to WSDOT transportation contracting, regardless of the race/ethnicity and gender of the owner. BBC then attempted to complete an availability telephone survey with each one of those business establishments. BBC was able to successfully contact 4,784 of those business establishments, or 45.3% of the business establishments with valid working phone numbers. Of the business establishments that BBC successfully contacted, 3,335 completed an availability telephone survey (69.7%). Based on information that BBC collected during the availability telephone survey, the study team determined that 988 of those businesses reported characteristics that made them potentially available for WSDOT transportation contracts. For details on BBC’s availability approach and how BBC used information about businesses to calculate availability, please see Chapter 5 and Appendix D of the disparity study report.

## **Q: MY FIRM WASN’T CONTACTED FOR THE AVAILABILITY ANALYSIS. WHY NOT, AND WHAT AFFECT DOES THAT HAVE ON THE RESULTS OF THE AVAILABILITY ANALYSIS?**

**A:** For the availability telephone survey, BBC attempted to contact only those businesses whose primary lines of work were most relevant to WSDOT transportation contracting (for a complete list of the construction and engineering industries that were considered most relevant to WSDOT transportation contracting, see Appendix D of the disparity study report). If your business was listed by Dun & Bradstreet as doing work in one of those industries, then BBC attempted to contact your business for the availability telephone survey. (Dun & Bradstreet has been accepted by the courts as the most comprehensive and unbiased source of business listings in the nation.) BBC attempted to successfully contact a responsible staff member at each business up to five times, on different days of the week, and at different times of the day. It is possible that BBC attempted to contact your business, but despite BBC’s five attempts, no one at your business was available to complete the survey.

If your business was unable to complete an availability telephone survey it has little, if any, effect on BBC’s availability estimates. The resulting availability estimates that result from BBC’s “custom census” availability approach are based on the percentage of contracting dollars for which particular types of businesses are available and are not based on a “head count” of those businesses. BBC’s methodology requires a representative, statistically valid number of businesses to complete availability surveys, which BBC achieved by using a census approach (as opposed to a sampling approach). For details, please see Chapter 5 and Appendix D of the disparity study report.

**Q: WHY DIDN'T WSDOT USE U.S. CENSUS DATA OR OTHER DATA TO SIMPLY COUNT THE NUMBER OF MINORITY- AND WOMEN-OWNED BUSINESSES IN THE REGION AND DIVIDE THAT VALUE BY THE TOTAL NUMBER OF BUSINESSES IN THE REGION TO ESTIMATE THE AVAILABILITY OF MINORITY- AND WOMEN-OWNED BUSINESSES?**

**A:** That approach to estimating relative availability is called a “head count” approach. A head count approach has not been found to be sufficient by the courts in calculating relative availability or in determining whether there are disparities for particular DBE groups. In addition, federal regulations do not provide that a head count approach is an acceptable way to calculate relative availability for goal-setting purposes or for disparity analyses. Relevant case law has held that a proper availability analysis should take several different factors into account, including businesses’ primary lines of work and their capacity to perform on an agency’s contracts (e.g., *AGC, San Diego v. California Department of Transportation*; *Western States Paving Company v. Washington State DOT*; *Rothe Development Corp. v. U.S. Department of Defense*; *Sherbrooke Turf, Inc. v. Minnesota DOT*; and *Northern Contracting, Inc. v. Illinois DOT*). BBC’s disparity study methodology, including its approach to calculating availability is consistent with and specifically supported by relevant case law, the federal regulations, and USDOT guidance. For details, see Appendix B of the disparity study report. BBC’s approach accounts for various relevant factors including the specific types of work that WSDOT contracts out, the size of WSDOT contracts, the geographic locations in which WSDOT contracts are performed, and businesses’ qualifications, willingness, and interest in working for WSDOT.

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